83 - 1398
No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE CROCKETT, JR., individually and in his capacity as a member of the United States House of Representatives, et al.,
Petitioners,

—v.—

RONALD WILSON REAGAN, individually and in his capacity as President of the United States, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners petition for a writ of certiorari to review the judgment of the Court of Appeals for the District of Columbia Circuit in this case.

QUESTIONS PRESENTED

(1) Whether in circumstances where the President failed to report to Congress pursuant to 50 U.S.C. §1543(a)(1) of the War Powers Resolution, that United States armed forces in El Salvador were introduced into hostilities or into situations of imminent hostilities and where such armed forces have remained in El Salvador for over sixty-two days, the Court properly dismissed for reasons of justiciability an action by members of Congress seeking to enforce the reporting and/or mandatory withdrawal provisions of the War Powers Resolution.

(2) Whether the court erred in dismissing the claims of members of Congress that the President violated the War Powers Clause of the Constitution (Art. 1, Sec. 8, cl. 11) by sending United States armed forces into hostilities or into situations of imminent hostilities in El Salvador.

(3) Whether the court erred in dismissing under the equitable discretion doctrine the claims of members of Congress that the President was furnishing military aid to El Salvador in violation of section 502B of the Foreign Assistance Act of 1961 (22 U.S.C. §2304) which prohibits the providing of such aid to governments engaged in a consistent pattern of gross violations of internationally recognized human rights.

LIST OF ALL PARTIES

Petitioners:

George W. Crockett, Jr.
Anthony C. Beilenson

William Clay
Ronald V. Dellums
Mervyn M. Dymally
Robert W. Edgar
Don Edwards
Walter Fauntroy
Thomas Foglietta
Barney Frank
Robert Garcia
William H. Gray III
Tom Harkin
Mickey Leland
Michael E. Lowry
Barbara A. Mikulski
George Miller III
Parren J. Mitchell
James L. Oberstar
Richard L. Ottinger
Gus Savage
Patricia Schroeder
James M. Shannon
Louis Stokes
Theodore S. Weiss

Respondents:

Ronald Wilson Reagan
Caspar W. Weinberger
George Schultz

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OPINIONS BELOW

The opinion of the Court of Appeals dated November 18, 1983, from which this petition is filed, is reported at 720 F.2d 1355 (D.C. Cir. 1983). It is reproduced at Appendix A. The opinion and order of the District Court dated October 4, 1982 is reported at 558 F.Supp. 893 (D.D.C. 1983). It is reproduced at Appendix B.

JURISDICTION

The judgment of the Court of Appeals was rendered on November 18, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

ARTICLE I, Sec. 8, Cl. 11, "The Congress shall have power...to declare war."

STATUTORY PROVISIONS INVOLVED

WAR POWERS RESOLUTION Sec. 2-9, 4(a), 50 U.S.C.A. Sec. 1541-1548.

FOREIGN ASSISTANCE ACT OF 1961 Sec. 102-903, 502(B(a)(2), 903, 22 U.S.C.A. (1976 Ed.) sec. 2151-2443, 2304(a)(2).

The text of the Statutory Provisions involved is set forth in Appendix C at A47.

STATEMENT OF THE CASE

(a) The Reasons For Dismissal of Plaintiffs Claims

This suit by twenty-nine members of Congress seeks to enforce the reporting and termination requirements of the War Powers Resolution (hereinafter "WPR"), 50 U.S.C. §§1541-1548. The Resolution requires the President to report to Congress whenever he has introduced United States armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances. Whenever he has reported or is required to do so by the circumstances, United States armed forces must be withdrawn

within sixty-two days unless Congress has given specific authorization for the forces to remain. 50 U.S.C. 1544(b). (App. at A50.)

Plaintiffs charge that United States armed forces have been introduced into El Salvador in circumstances that required the President to report pursuant to the WPR. This suit seeks to enforce the reporting and termination requirements of that statute.

In a related claim plaintiffs assert that the facts which trigger the WPR also constitute a violation of the War Powers Clause. As Congress has not assented to the employment of United States armed forces in El Salvador, those forces must be withdrawn.

Finally, plaintiffs challenge continued military aid to El Salvador for the reasons that such aid is prohibited by the human rights provisions of the

Foreign Assistance Act of 1961, 22 U.S.C. §2304. These provisions, without any qualifications, prohibit military assistance to governments engaged in a consistent pattern of gross violations of internationally recognized human rights. (App. at A56.)

The Court of Appeals in a brief per curiam opinion affirmed the decision of the District Court dismissing all of plaintiffs claims. It dismissed the WPR claims and the claims under the Foreign Assistance Act "for the reasons stated by the District Court." 720 F.2d 1355, 1357 (D.C. Cir. 1983). (App. at A1.) For this reason, the discussion which follows concerns the opinion of the District Court.

The District Court held that the question presented under the WPR belongs "to the category [of questions] characterized by a lack of judicially

discoverable and manageable standards for resolution," (App. at A21.) and that "in its present posture [the case] is non-justiciable because of the nature of the factfinding that would be required..." (App. at A14.)

Although dismissing "this case in its current posture", (App. Id.) the court did not hold that all suits alleging violations of the WPR were non-justiciable:

> The Court disagrees with defendants that this is the type of political question which involves potential judicial interference with executive discretion in the foreign affairs field. Plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning procedures for decision-making. Moreover, the issue here is not a political question simply because it involves the apportionment of power between the executive and legislative branches. The duty of courts to decide such questions has been repeatedly reaffirmed by the Supreme Court.

(App. at A21-22, emphasis added.)

Rather, the court concluded that it was not competent to determine the facts regarding United States troop involvement in El Salvador. This was despite plaintiffs' detailed allegations, based primarily upon Government admissions, that United States Armed Forces were in situations of actual or imminent hostilities. The court pointed out that "if plaintiffs' allegations are correct, the executive branch does not merely have a different view of the application of the WPR to the facts, but also is distorting the reality of our involvement in El Salvador." (App. at A19.) But instead of accepting plaintiffs' facts, as is required in deciding a motion to dismiss, the court relied upon affidavits submitted by the Government and reached the conclusion that because of conflicting facts, and the court's claimed inability to resolve the

conflict, it could not proceed. At no point were plaintiffs permitted to prove their case.

The court addressed the relief it could have given, had it not dismissed the action. It held that a court could not order troop withdrawal when the President had failed to file the required report within 48 hours of the date of introduction of United States Armed Forces into situations of hostilities or imminent hostilities. But it also held that it could order that such a report be filed "or, alternatively, withdrawal 60 days after a report was filed or required to be filed by a court or Congress." (App. at A34-35.)

The court did not reach the other asserted bases for dismissal which included standing, equitable discretion and lack of a private right of action. It concluded its opinion on the WPR with

an assertion of the court's power to decide such disputes:

> As already stated, the Court does not decide that all disputes under the War Powers Resolution would be inappropriate for judicial resolution.

(App. at A39.)

The court dealt with plaintiffs' claims under the human rights statutes quite differently. While admitting that plaintiffs' claims of gross violations of human rights by the Salvadoran government "are, at a minimum, disturbing", the court found that Congress had "expressed approval of the aid in question" and refused to look behind the President's certification that the human rights situation was improving:

> The claim under the Foreign Assistance Act differs significantly from that under the War Powers Resolution, which raises a constitutional question of Presidential usurpation of congressional warmaking power. In addition, the Resolution contains a specific provision that legislation cannot authorize Presidential action subject to the WPR unless it

> specifically states that it is authorization for the purposes of the WPR. Here there is no such restraint, and, indeed the Congress has expressed its approval of the aid in question.

(App. at A44-45.)

On this basis the Court dismissed the human rights claim under the doctrine of equitable discretion.

At the time of the Court's decision the International Security and Development Act of 1981 was still law. This Act required certifications for continued military aid to El Salvador. That Act has expired and, now, the Foreign Assistance Act's prohibition on military aid governs. Under these circumstances the doctrine of equitable discretion seems especially inappropriate.

(b) The Facts of the WPR and War Powers Clause Claims

The Complaint sets forth details of the involvement of United States Armed

Forces in El Salvador. (J.A. 8-10.[1]) A United States official has stated that the country is "torn by violence" and that "no place is totally safe". (J.A. 5.) Attacks by the Farabundo Marti National Liberation Front (hereinafter "FMLN") occur everywhere. The Complaint alleged that fighting is occurring in three provinces and there are frequent attacks on bases where United States Armed Forces are stationed. Recently, the FMLN seized the important town of Berlin and a United States soldier was a casualty of that battle.[2]

The complaint details the functions of 56 United States Armed Forces personnel in El Salvador. They "are involved

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[1] J.A. refers to the Joint Appendix filed in the D.C. Circuit.

[2] New York Times, February 27, 1983 at A1,8; New York Times, March 1, 1983 at A1,10.

in two operational and planning assistance teams designed to prosecute the war" and are assigned to "coordinate planning and operations among the five regional commands of the junta and its armed forces." Other United States Armed Forces personnel are counter-insurgency specialists distributed throughout the country where some of the worst fighting occurs and they "advise and coordinate the Junta's armed forces in respect to particular missions and counterinsurgency techniques." (J.A. 9.)

The complaint alleged that United States armed forces have been subjected to armed attacks[3], suffered casualties[4],

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[3]For example, "on April 4, 1981, 100 armed personnel, part of the military forces of the FMLN, attacked the San Salvador air base housing the United States Military Advisers involved in the helicopter 'counter-insurgency program'." (J.A. 10.)

(Footnote Continued)

been seen fighting side by side with Salvadoran government troops[5], filmed

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(Footnote Continued)

[4]On February 2, 1983 the United States admitted that a United States soldier suffered a leg wound from ground fire during a helicopter mission. He was one of five United States soldiers accompanying Salvadoran personnel aboard two helicopters engaged in a combat mission intended to make direct contact with a Salvadoran unit on a tactical operation. The second helicopter drew fire as well. (Washington Post, Feb. 4, 1983 at A1.)

[5] In June 1982, ten United States soldiers were reported to be taking part in combat operations along the Lempa River, an area of persistent fighting about 45 miles southeast of San Salvador. The report stated that personnel from the United States Armed Forces were fighting "side-by-side" with Salvadoran government troops. The United States Forces were wearing combat fatigues, carrying M-16 rifles and firing 51 mm mortars against a rebel base. (J.A. 743.)

carrying grenades and M-16 rifles[6], and have been present during major attacks[7].

A report by the Comptroller General on the "Applicability of Certain United States Laws That Pertain To U.S. Military Involvement In El Salvador" issued in July 1982, prior to the February 1983 United States casualty, points out that United States military personnel are drawing special "hostile fire pay". (J.A. 746.) To receive such "hostile

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[6]On February 12, 1982, the day this case was argued in the District Court, a crew from Cable News Network videotaped three United States military "advisers" carrying M-16 rifles and M-79 grenades in a guerilla-contested area in the far eastern portion of the country.

[7]In January 1982, the FMLN attacked Ilopango, the main airbase of the Salvadoran air force, located close to San Salvador. Nearly half of the helicopter fleet was crippled and at a time when United States military advisers were on the base. (Report by the Comptroller General, GAO/ID-82-53, at 21, July 27, 1982.

fire pay" a soldier must sign a monthly statement saying: "I was subjected to hostile fire" and the approving officer must certify that the soldier "was subjected to small arms fire or he was close enough to the trajectory, point of impact or explosion of hostile ordnance so that he was in danger of being wounded, injured or killed." (J.A. 746.)

The Report states that the Pentagon initially designated all of El Salvador as a "hostile fire zone", which would have made unnecessary monthly reports by each soldier. This tentative ruling was, however, reversed "for policy reasons".

These facts, which the defendants had no legal right to contest in their motion to dismiss, clearly established that the WPR was triggered.

(c) The Human Rights Violations

Since January, 1980 the El Salvadoran government and its armed

forces and security forces have been responsible for the following:

a) Political assassinations by military and security forces of massive numbers of unarmed, innocent civilians including women and children who the Junta considers to be political dissidents;

b) The toleration, if not encouragement, of various non-governmental death squads who engage in political assassinations;

c) Arbitrary arrests and cruel and inhuman punishment and imprisonment;

d) Disappearances of persons previously in the custody or armed or security forces; and

e) Torture.

The evidence establishing these various categories of the denial of human rights by the government of El Salvador and the armed and security forces has

been consistent and has been emanating from many internationally-recognized independent groups which are not involved in the conflicts in which the government of El Salvador and the FMLN are engaged. Some of the evidence is the following:

For example, according to the Legal Department of the Archdiocese of San Salvador, 80% of the 5,303 assassinations which occurred from January 1, 1980 to September 28, 1980, were committed by the National Army and the Military Corps of National Security including the National Guard, the National Police, and the Rural Police. (See Report of the Legal Department of the Archdiocese, dated October 1, 1980, hereinafter "Archdiocese Legal Department Report", J.A. 47.)

Since October, 1979, according to Amnesty International, 35,000 Salvadorans are estimated to have died as a result of political violence, and government forces

are implicated in at least 6,000 of these deaths; 3,300 of these were peasants. (A.I./U.S.A. Testimony, March 1981, J.A. 41.)

On May 14 and 15, 1980, hundreds of peasants, including women and children, were killed by army and National Guard units in Rio Sumpul, which is near the Honduran border. Amnesty International received reports of the massacre from priests at the nearby town of Santa Rosa de Copan in Honduras. (Amnesty International Report dated August 11, 1980, J.A. 47.)

One of the consequences of the civil war in El Salvador is a large number of refugees, estimated by the 1980 Report of the U.S. State Department at 62,000. (U.S. State Dept., Country Reports on Human Rights Practices, February 1981). Many of such refugees flee to neighboring Honduras. Even refugees who have managed

to cross the border into Honduras are not safe. Amnesty International reports that Salvadoran units cross the border to attack refugees in Honduras. (Amnesty International Report dated January 22, 1980, J.A. 58.)

The killing of large numbers of people, as set forth above, has also extended to churchpeople who have shown sympathy for downtrodden Salvadorans. On Mary 24, 1980, Archbishop Oscar Arnulfo Romero of the Roman Catholic Church of El Salvador was assassinated while celebrating mass at his cathedral. When 80,000 people attended the funeral of the Archbishop, government attacks on the crowd resulted in the death of 40 people. In addition, a priest was killed in November and four American missionaries were murdered in December. (Amnesty International Reports dated 12/4/80 and

12/5/80, J.A. 59.) Union leaders[8], teachers[9], and journalists[10] have been

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[8]For documentation of murders, abductions, and other uses of force against those in El Salvador seeking to form unions see, Wipfler, "El Salvador: Reform as Cover for Repression," Christianity in Crisis, Vol. 40, No. 8, May 12, 1980 (J.A. 66); Archdiocese Legal Department Report, (J.A. 27); Amnesty International Report dated 8/27/80 (J.A. 81); Amnesty International Annual Report (J.A. 74).

[9]According to the Report of the Legal Department of the Archdiocese, 84 teachers from the National Association of Salvadoran Teachers were seized and killed in 1980 and 21 were removed from their classrooms in front of their students. (Archdiocese Legal Department Report, at p. 5, J.A. 27, Statement by Amnesty International on the Occasion of the Tenth Regular Session of the General Assembly of the Organization of American States, 19-28 November 1980, J.A. 82.)

[10]In July, the editor and the photographer of the opposition newspaper La Cronica were abducted and found dead with signs of torture. On January 15, 1980, staff members of the Salvadoran newspaper El Independente were abducted and the paper was forced to close. In addition, the radio station of the Catholic Church was closed down by the government. (A.I. Report, 2/2/81, J.A.

(Footnote Continued)

designated subjects for repression in El Salvador.

The Annual Report of the Inter-American Commission on Human Rights of the Organization of American States, 1979-1980 (J.A. 87) in referring to the mass killings in El Salvador, states:

> The Inter-American Commission on Human Rights is particularly concerned over the relative passivity of the government as regards certain armed groups which still maintain ties with former members of security agencies and of the dissolved organization ORDEN which are apparently responsible for hundreds of killings, and over the absence of adequate, effective investigation of such crimes by the authorities.

On December 15, 1980, the United Nations General Assembly passed Resolution 35/192 which, in acknowledging the grave human rights violations in El Salvador, called upon "Governments to

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(Footnote Continued)
61, A.I./U.S.A. Testimony, March 1981, J.A. 38.)

refrain from the supplying of arms and other military assistance in the current circumstances." (J.A. 101.)

Notwithstanding the foregoing, the defendants have and are giving extensive military assistance to the government of El Salvador and its military forces.

REASONS FOR GRANTING THE WRIT

(a) The War Powers Resolution and War Powers Clause of the Constitution

This case involves the power to commit the country to war, a power which, as Abraham Lincoln said, were it possessed by Presidents alone, would place them "where kings once stood."[11] No previous challenge to presidential warmaking power has involved a special statute designed to prevent war by presidential fiat and designed to protect

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[11] A. Schlesinger, Jr., The Imperial Presidency, at 187 (1973).

the constitutional power of Congress to participate in the decision to commit the country to war. A violation of the WPR is also a violation of Congress' power to declare war under Article I, §8, Clause 11 of the U.S. Constitution. Only to the extent that the Chief Executive follows the prescriptions of the WPR, will Congress have succeeded in recouping its constitutional prerogatives.

Unfortunately, the President has failed to follow the prescriptions of the WPR not only with regard to El Salvador, but in every situation where it has been applicable. The President takes the position, and did so in the Court of Appeals, that the Resolution invades his Constitutional power as Commander-in-Chief. No President has ever officially reported under the Act; President Reagan pointedly refrains from acknowledging the applicability of the reporting

requirements, §4(a)(1) of the WPR. See, e.g., 98th Congress, 1st Sess., Cong. Rec. S13033 (daily ed. Sept. 28, 1983)(remarks of Sen. Eagleton).

Unless and until this Court rules, the proscriptions of the WPR will continue to be ignored with dire consequences for the country. If the judiciary also refuses to recognize the existence of hostilities or imminent hostilities, which are the circumstances which trigger the reporting requirement, Congress is by necessity left with the burden which both the War Powers Clause and the War Powers Resolution insist it should not bear. If the judiciary refuses to take part, then United States military involvement, rather than requiring a declaration of war or specific congressional authorization, will be presumed legitimate until Congress specifically says otherwise.

This is contrary to the intent of both the Framers of the Constitution and the authors of the War Powers Resolution. See, e.g., Cong. Rec., Sept. 28, 1983, at S13034 (statement of Sen. Eagleton, quoting James Madison). Therefore, judicial restraint here cannot be justified on grounds of non-justiciability; such a decision effectively means that the court is ruling on the merits of the underlying constitutional and legal claims, by placing on Congress an unconstitutional and illegal burden. It is imperative that courts not decide the merits on threshold issues of jurisdiction or justiciability. Bell v. Hood, 327 U.S. 678, 681-2 (1946); Miller v. Stanmore, 636 F.2d 986, 992 n.9 d(5th Cir. 1981).[12]

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[12]The District Court's decision and
(Footnote Continued)

The WPR requires that the President formally report to Congress within 48 hours:

> in any case in which United States Armed Forces are introduced

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(Footnote Continued)
affirmance by the Court of Appeals here explicitly reaches the merits in dismissing on justiciability grounds. The court emphasizes that it is not holding all WPR claims non-justiciable, just this one. It suggests that were this the Vietnam War, it would have no problem holding that the War Powers Resolution applies and is enforceable. (App. at A24.) The holding of non-justiciability, then, turns not on the inherent impossibility of judicially interpreting "imminent hostilities", but on the difficulty of interpreting it in this particular case. That finding relies on defendants' arguments on the merits, and itself necessarily goes to the merits, which is inappropriate at the justiciability threshold. See, e.g., Goldwater v. Carter, 617 F.2d 697, 701-2 (D.C. Cir. 1979), judgment vacated on other grounds, 444 U.S. 996 (1979); Riegle v. Federal Open Market Committee, 656 F.2d 873, 877 (D.C. Cir. ____), cert. denied, 454 U.S. 1082 (1981); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977) (all three accepting legal theories and well-pleaded facts as true when considering justiciability questions, because such questions concern the jurisdiction of the court and not the merits of the case).

> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances...

(50 U.S.C. §1543).

This report is at the very heart of the mechanism for joint decision-making established by the WPR. The report begins the sixty-day period within which troops must be withdrawn in the absence of congressional approval. It shifts the burden of initiating congressional debate away from the congress which is notoriously taxed and sometimes even unwilling to face vital issues or constitutional confrontations and places it squarely on the President. The WPR mandates that the President withdraw the troops no later than 62 days from the date of their

commitment, even if Congress has taken no action.[13]

The WPR defines what is meant by "introduction of United States Armed

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[13]As the District Court found on this point:

So that Congress would be informed at the outset of any involvement that could potentially lead to war, the Resolution provides for prior consultation (not at issue here), and early reporting whenever any American troops are introduced into a situation of hostilities, or even imminent hostilities, on the President's initiative and without declaration of war. The President is not to wait until our forces are actually engaged in combat before informing Congress. Further, the automatic cutoff after 60 days was intended to place the burden on the President to seek positive approval from the Congress, rather than to require the Congress positively to disapprove the action, which had proven so politically difficult during the Vietnam War. To give force to congressional power to declare war, Presidential warmaking would not be justified by congressional silence, but only by a congressional initiative to "declare war." (App. at A28-29.)

Forces"[14] and the legislative history sets forth the meanings of the terms "hostilities" and "imminent hostilities".[15]

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[14]This is set forth in §1547(c):

For purposes of this Chapter, the term introduction of United States Armed Forces includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country when such military forces are engaged or there exists an imminent threat that such forces will become engaged in hostilities. See App. at A55.

[15]"The word hostilities was substituted for the phrase armed conflict...because it was considered to be somewhat broader in scope. In addition to a situation in which fighting actually has begun, hostilities also encompasses a state of confrontation in which no shots have been fired but where there is a clear and present danger of armed conflict. 'Iminent hostilities' [as used in the Resolution] denotes a situation in which there is a clear potential either for such a state of confrontation or for actual armed conflict." H.R. No. 287, 93rd Cong., 1st Sess., reprinted in [1973] U.S. Code Cong. & Ad. News 2346, 2351 (emphasis in original).

Section 1544(b) states that within sixty days "after a report is submitted or is required to be submitted pursuant to Section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of the United States Forces with respect to which such report was submitted (or required to be submitted) unless the Congress..." declares war, or has specifically approved continued use of such troops, or has extended the sixty-day period or cannot meet because of an armed attack on the United States.

In any situation where the President is required to report, even if he fails to do so, he is obligated to withdraw all United States armed forces within sixty days, unless Congress takes certain

actions. If Congress does nothing, the troops must be removed.[16]

It was precisely this automatic termination requirement that caused President Nixon to veto the Resolution and was the main theme of the supplemental and minority views in the congressional reports.[17]

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[16]As Senator Javits, one of the principal authors of the bill, stated:

> The approach taken in the War Powers Bill reverses the situation by placing the burden on the Executive to come to Congress for specific authority. The sponsors of the Bill believe that this provision [the 60 day automatic cutoff] will provide an important national safeguard against creeping involvement or future Vietnam style wars. 119 Cong. Rec. 1400 (1973).

[17]The Veto Message complained as follows:

> One of its provisions would automatically cut off certain authorities after sixty days unless Congress extended them.
> ...

(Footnote Continued)

Congress assumed that the President would abide by the War Powers Resolution, that he would not become a lawbreaker, but would terminate the involvement of United States Armed Forces within the statutory period. As stated by Senator Javits:

> The thirty-day provision (60 days in the final Resolution) contained in Section 5 assumes that the President will act according to law. No other

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(Footnote Continued)

> I am particularly disturbed by the fact that certain of the President's constitutional powers as Commander in Chief of the Armed Forces would terminate automatically under the resolution 60 days after they were invoked. No overt Congressional action would be required to cut off these powers. They would disapppear automatically unless the Congress extended them. In effect, the Congress is here attempting to increase its policy-making role through a provision which requires it to take absolutely no action at all. (Veto of the War Powers Resolution, J.A. 234).

See also Supplemental View and Minority Views on H.R. No. 93-287, reprinted in [1973] U.S. Code Cong. and Ad. News 2358-2361.

> assumption is possible unless we are to discard our whole constitutional system.

119 Cong. Record at 1401 (1973).

The President has not, however, complied with the reporting or termination requirements of the Resolution. Yet the circumstances clearly require him to do so. Administration officials report that the military situation is "discouraging" and request additional "advisers" and substantial increases in aid.[18] United States Armed Forces, contrary to the Administration's initial statements, carry M-16 machine guns and grenades and participate in military operations. At least one known United States casualty

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[18] New York Times, February 27, 1983 at A1,8: New York Times, March 1, 1983 at A1,10.

has occurred.[19] The "advisers", although allegedly not at risk, are drawing hostile fire pay. (J.A. 746) The WPR was passed to insure that such a scenario would not unfold without congressional approval. The District Court's dismissal and affirmance by the Court of Appeals has frustrated this purpose and neglected the costly lessons learned in Vietnam.

The district court's refusal to find the facts below is clearly inappropriate in a case held to be inherently justiciable as this case was. The court's refusal was based on a misreading of Baker v. Carr, which never contemplated inability to find facts as the sole criterion for "political question" dismissal, when none of the other criteria apply. Furthermore, the

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[19] Washington Post, February 4, 1983 at A1.

facts which the court would have had to find below are no more difficult to ascertain than in many other cases. It could not have been clear to the district court, at the stage at which it rendered its opinion, that plaintiffs could not have produced the evidence needed to support their claim, nor that they could not have done so from readily available witnesses and admissible documentary sources. At the very least, the court was required to afford plaintiffs an opportunity to prove that they could have met their burden of proof, if given the opportunity.

Thus the court, by reaching a wrong or hasty conclusion on an essentially procedural point, frustrated the very purpose of the War Powers Resolution, in the first court test of that extremely important post-Vietnam piece of legislation, and at a time when the parallels

between the early stages of United States involvement in El Salvador and Vietnam are becoming clearer with every front page news story.

This Court must act to restore the balance between the Congress and the President; a balance which Congress attempted to remedy by passage of the WPR. Certiorari should be granted to consider these important questions.

(b) The Human Rights Claim

This case also provides the first test of the human rights provisions of the Foreign Assistance Act of 1961, 22 U.S.C. §2304. This statute prohibits military aid to countries engaged in a consistent pattern of gross violations of human rights. Despite overwhelming evidence that the Government of El Salvador and its security forces are engaged in such a pattern, the United States continues to pour aid into El

Salvador. The District Court's dismissal and Court of Appeals affirmance threatens to make a mockery of Congress' intent to have the United States comply with internationally recognized human rights standards.

In 1974 Congress, acting pursuant to its constitutional power over appropriations and its obligations under the United Nations Charter and various treaties, passed Section 502B of the Foreign Assistance Act of 1961, 22 U.S.C. §2304 (hereinafter, FAA in App. at A56). Section 2304 entitled "Human Rights and Security Assistance", implements the obligations of the United States under the United Nations Charter and other international instruments to promote and encourage increased respect for human rights and fundamental freedoms..." 22 U.S.C. 2304(a)(1).

The operative language of Section 2304 states that:

> (2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. 22 U.S.C. §2304(a)(2).[20]

The Joint Explanatory Statement of the Committee of the Conference stated that this legislation establishes

> a legal requirement to deny security assistance to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights.

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[20] The statute defines violations of internationally recognized human rights as:

> torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, other flagrant denials of the rights to life, liberty, or the security of the person. 22 U.S.C. §2304(d)(1).

(emphasis added) House Conf. Rept. No. 95-1546, reprinted in [1978] U.S. Code Cong. & Ad. News 1833, 1873-1874. The legislation requires the President to withhold security assistance to gross violators of human rights.

The security assistance prohibited by Section 2304(a)(2) is defined to include military assistance, aid from the economic support fund, funds for military education and training, aid for peace-keeping operations, sales of defense articles or services, and extension of credits. 22 U.S.C. §2304(d)(2). Security assistance as so defined is precisely the type of assistance which is being provided to the Government of El Salvador. (J.A. 20, 21.)

Plaintiffs have alleged in their Amended Complaint that the Government of El Salvador is engaged in a consistent pattern of gross violations of human

rights. They have supported this conclusion with detailed factual showings and many pages of documentary materials.

Section 2304(a)(2) does provide a means under which specified types of security assistance can be given to countries despite human rights violations. This exception to the rule is possible if:

> [T]he President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.

22 U.S.C. §2304(a)(2). No such certification has been made.

Plaintiffs requested the Court to end aid to El Salvador because of the violation of Section 502B of the Foreign Assistance Act. That prohibition is absolute. The Court's determination that Congress was required to pass another law to enforce Section 502B was erroneous;

Congress need not be both legislator and sheriff. Without Court enforcement the human rights obligations of the statute are a nullity.

CONCLUSION

For the foregoing reasons, the Court should issue the writ.

Respectfully submitted,

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Dated: February 16, 1984

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2461

GEORGE CROCKETT, JR., individually
in his capacity as a member of the
United States House of Representatives, *et al.*,
APPELLANTS

v.

RONALD WILSON REAGAN, individually and in
his capacity as President of the United States, *et al.*

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 81-1034)

Argued October 18, 1983

Decided November 18, 1983

Peter Weiss, a member of the Bar, Second Department Appellate Division of New York, pro hac vice by special leave of Court with whom *Ira Lowe* and *Reverend Robert F. Drinan, S.J.* were on the brief for appellants. *Frank E. Deale* also entered an appearance for appellants.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Vincent M. Garney, Attorney, Department of Justice, with whom *J. Paul McGrath*, Assistant Attorney General, *Stanley S. Harris*, United States Attorney and *Brooke Hedge*, Attorney, Department of Justice, were on the brief for the appellees. *Neil H. Koslowe*, Attorney for the Department of Justice also entered an appearance for appellees.

Steven M. Schneebaum and *Keith R. Fisher* were on the brief for International Human Rights Law Group, Amicus Curiae, urging reversal.

Sara E. Lister and *Sarah E. Burns* were on the brief for National Counsel of Churches of Christ in the United States of America, et al., Amici Curiae, urging affirmance.

Alan Dranitzke was on the brief for Catholic Peace Fellowship, *et al.*, Amici Curiae, urging reversal.

Jose Acosta was on the brief for Border Association for Refugees from Central America, Amicus Curiae, urging reversal.

Daniel J. Popeo, Paul D. Kamenar and *Nicholas E. Calio* were on the brief for Senators Jepsen, *et al.*, Amici Curiae, urging affirmance.

Before EDWARDS and BORK, *Circuit Judges*, and LUMBARD,* *Senior Circuit Judge*, United States Court of Appeals for the Second Circuit.

PER CURIAM: This is an appeal from the dismissal of a suit brought by 29 Members of Congress against President Reagan and other United States' officials, challenging the legality of the United States' presence in, and military assistance to, El Salvador. The principal contention of the plaintiffs-appellants is that United States military officials have been introduced into situations in El Salvador where imminent involvement in hostilities is clearly indicated by the circumstances and, consequently,

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. V 1981).

the President's failure to report to Congress is a violation of both the War Powers Resolution ("WPR")[1] and the war powers clause in the Constitution.[2] The appellants also alleged that violations of human rights by the Government of El Salvador are pervasive and that, in the absence of a certification of "exceptional circumstances" by the President, United States military assistance to El Salvador violates the Foreign Assistance Act of 1961 ("FAA").[3] In pursuing their claims, plaintiffs-appellants have sought, *inter alia*, an injunction directing that the

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[1] 50 U.S.C. §§ 1541-1548 (1976). Section 4(a) of the WPR, 50 U.S.C. § 1543(a) (1976) provides:

> In the absence of a declaration of war, in any case in which United States Armed Forces are introduced—
>
> (1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;
>
> (2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or
>
> (3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation;
>
> the President shall submit with 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth—
>
> (A) the circumstances necessitating the introduction of United States Armed Forces;
>
> (B) the constitutional and legislative authority under which such introduction took place; and
>
> (C) the estimated scope and duration of the hostilities or involvement.

[2] U.S. CONST. art. 1, § 8, cl. 11.

[3] 22 U.S.C. §§ 2151-2443 (1976 & Supp. V 1981). Section 502B of the FAA prohibits security assistance to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights," unless the President certifies that "extraordinary circumstances exist warranting provision of such assistance." 22 U.S.C. § 2304(a)(2) (Supp. V 1981).

appellees immediately withdraw all United States Armed Forces, weapons, military equipment and aid from El Salvador and prohibiting any further aid of any nature.

The District Court dismissed all of plaintiffs' claims without resolution of the merits of their suit. *Crockett v. Reagan*, 558 F. Supp. 893 (D.D.C. 1982). Judge Joyce Green held that the war powers issue presented a non-justiciable political question. In particular, Judge Green found that the trial court did not have the resources or expertise to resolve the particular factual disputes involved in this case, *id.* at 898, 899, and that Congress had taken no action which would suggest that it viewed our involvement in El Salvador as subject to the WPR. *Id.* at 899. Judge Green's dismissal of the FAA claim was based on the equitable discretion doctrine, which counsels judicial restraint where a congressional plaintiff's dispute is primarily with his or her fellow legislators. *Riegle v. Federal Open Market Committee*, 656 F.2d 873, 881 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981).

We have reviewed with care the parties' contentions and submissions and we can find no error in the judgment of the District Court. We therefore affirm the dismissal of this case for the reasons stated by the District Court.

So ordered.

BORK, *Circuit Judge, concurring*: In my view, jurisdiction is absent in this case because plaintiffs lack standing. I continue to believe that an alleged diminution in congressional influence must amount to a disenfranchisement—a nullification or diminution of a congressman's vote—before a congressional plaintiff may claim the requisite injury-in-fact necessary to confer standing to sue. *See Vander Jagt* v. *O'Neill*, 699 F.2d 1166, 1180-81 & n.1 (D.C. Cir. 1982) (Bork, J., concurring), *cert. denied*, 52 U.S.L.W. 3237 (U.S. Oct. 3, 1983) (No. 82-2001). *See also Goldwater* v. *Carter*, 617 F.2d 697, 702 (D.C. Cir.) (en banc), *judgment vacated on other grounds*, 444 U.S. 996 (1979). Congressional plaintiffs here have lost no part of their right to vote and thus have not suffered the "judicially cognizable injury," *Metcalf* v. *National Petroleum Council*, 553 F.2d 176, 187 (D.C. Cir. 1977), necessary to give them standing.

I also adhere to my view that separation-of-powers considerations are properly addressed as part of the standing requirement. In *Riegle* v. *Federal Open Market Committee*, 656 F.2d 873, 879-80 (D.C. Cir.), *cert. denied*, 454 U.S. 1082 (1981), a panel of this court concluded that separation-of-powers concerns have no bearing on standing analysis. Instead, the *Riegle* court created a "doctrine of equitable discretion" within which those concerns would be addressed. 656 F.2d at 881. In *Vander Jagt*, the panel majority expanded the doctrine and assumed the virtually "unconfined judicial power to decide or not to decide" cases. 699 F.2d at 1185 (Bork, J., concurring). I do not consider myself bound by the panel decisions in *Riegle* and *Vander Jagt*. Prior to those cases, this circuit had worked out a "fairly definite formula to relate separation-of-powers concerns to the problem of legislator standing." *Vander Jagt*, 699 F.2d at 1180-81 (Bork, J., concurring). *Riegle* and *Vander Jagt* purported to change the law of legislator standing in this circuit without submitting the issue to the full court. Under the established practice of this court, that may not be done. *See Irons* v. *Diamond*, 670 F.2d 265, 268 n.11 (D.C. Cir. 1981).

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Congressman George W. Crockett, Jr., et al.,
Plaintiffs,

v. CIVIL ACTION No. 81-1034

President Ronald W. Reagan, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

This case was brought by 29 Members of Congress against Ronald Reagan, individually and in his capacity as President of the United States, Caspar W. Weinberger, individually and in his capacity as Secretary of Defense, and Alexander M. Haig, Jr., individually and in his capacity as Secretary of State.*

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*Alexander Haig has since been replaced as Secretary of State of George Shultz.

Plaintiffs have alleged that defendants have supplied military equipment and aid to the government of El Salvador in violation of the War Powers Clause of the Constitution, the War Powers Resolution, 50 U.S.C. §§1541-1548, and Section 502B of the Foreign Assistance Act of 1961, 22 U.S.C. §2304. More specifically, plaintiffs aver that a civil war is now in progress throughout El Salvador, with the Salvadoran Revolutionary Government Junta and its armed forced on one side, and the Democratic Revolutionary Front and its armed forced known as the Faribundo Marti National Liberation Front (FMLN) on the other. According to the complaint, in addition to the provision of monetary aid and military equipment, the defendants have dispatched at least 56 members of the United States Armed Forces to El Salvador in aid of the Junta. These forces allegedly are in situations where

imminent involvement in hostilities is clearly indicated by the circumstances, and are allegedly taking part in the war effort and assisting in planning operations against the FMLN. Plaintiffs claim that this involvement violates Article 1, Section 8, Clause 11 of the Constitution, granting to Congress the exclusive power to declare war, as implemented by the War Powers Resolution (WPR). The WPR requires that absent a declaration of war, a report be made to the Congress within 48 hours of any time when United States Armed Forces have been introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances,[1] and that 60 days after a

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[1] Reports are also required when United States Armed Forces are introduced "into the territory, airspace or waters

(Footnote Continued)

report is submitted or is required to be submitted, the President shall terminate any use of United States Armed Forces unless Congress declares war, enacts a specific authorization for such use of United States Armed Forces, or extends the 60-day period for 30 addition days. WPR §§4, 5(b), 50 U.S.C. §§1543, 1544(b). No report pursuant to the WPR has been made, and American forces have remained more than 60 days since they allegedly were introduced into a situation of hostilities or imminent hostilities without a declaration of war.

(Footnote Continued)
of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces; or...in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation...". WPR §4(a); 50 U.S.C. §1543. The mandatory withdrawal after 60 days absent specific authorization provided in §5(b) does not apply to these circumstances.

A cause of action is also stated under Section 502B of the Foreign Assistance Act of 1961, which prohibits the provision of security assistance to "any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights," which, plaintiffs contend, is the situation in El Salvador. A separate cause of action was originally stated under various provisions of international law (First Amended Complaint, Third Cause of Action), but plaintiffs have since stated that they recognize that there is no cause of action under international law, except as specifically implemented by Section 502B of the Foreign Assistance Act. Statement of Points and Authorities in Opposition to Defendants' Motion to Dismiss at 15-16.

Plaintiffs seek declaratory judgments that the actions of defendants have violated the above-described provisions of law, and a writ of mandamus and/or an injunction directing that defendants immediately withdraw all United States Armed Forces, weapons, and military equipment and aid from El Salvador and prohibiting any further aid of any nature.

Oral argument was held on defendants' motion to dismiss, and amicus curiae briefs were accepted from the group of 16 Senators and 13 Members of Congress which had previously moved to intervene.

Defendants have urged several grounds for dismissal: that the complaint presents a non-justiciable political question, that plaintiffs have not established standing, that the Court should exercise its equitable discretion

to dismiss, and that there is no private right of action under the statutory provisions invoked by plaintiffs. Defendants contend that all of these grounds for dismissal have been given additional force by the passage in December, 1981 of the International Security and Development Cooperation Act of 1981, Pub.L. No. 97-113, 95 Stat. 1519 (1981), which (at §728) specifically authorizes economic and military assistance to El Salvador, including the assignment of members of the Armed Forced to El Salvador to carry out functions under the Foreign Assistance Act of 1961 or the Arms Export Control Act. However, the 1981 Act is not dispositive of the cause of action under the WPR. It is not claimed that it constitutes the specific authorization as required by Section 8(a) of the WPR, 50 U.S.C. §1547(a). That section states that authority to

introduce armed forces into hostilities or imminent hostilities shall not be inferred from any other provision of law unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or situations of imminent hostilities and states that it is intended to constitute specific statutory authorization within the meaning of the WPR. The 1981 Act clearly does not do so. Also, plaintiffs argue that while the Act may demonstrate Congressional approval for a training function for U.S. forces in El Salvador, it does not demonstrate assent to what they claim is actually occurring, that is, involvement of those forces in hostilities and imminent hostilities.

The War Powers Resolution

If the merits were reached, the Court would have to decide whether the Resolution is applicable to the American

military presence in El Salvador, and if so, what remedial action is appropriate. The Court decides that the cause of action under the WPR in its present posture is non-justiciable because of the nature of the factfinding that would be required, and that the 60-day automatic termination provision is not operative unless a report has been submitted or required to be submitted by Congress or a court.

Although defendants have not emphasized the factual issues, which need not be reached if their motion to dismiss is granted, their pleadings and exhibits do make clear that the position of the government is that the factual circumstances in El Salvador do not trigger the WPR, that is, U.S. Armed Forces have not been "introduced into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the

circumstances." Plaintiffs present a significantly different picture of what is actually occurring in El Salvador, and the relationship of U.S. military personnel to it. Although consideration of the merits might reveal disagreements about the meaning of WPR terms such as "imminent involvement in hostilities," the most striking feature of the pleadings at this stage of the case is the discrepancy as to the facts.

In support of their position, defendants have submitted the declaration of Lieutenant General Ernest Graves, Director of the Defense Security Assistance Agency, whose responsibilities include the administration and oversight of all security assistance programs conducted by the Department of Defense, (Ex. 8 to Defendants' Motion to Dismiss), and a statement by the Department of State provided to Congressman William

Broomfield in response to questions about the applicability of the WPR to the dispatch of military personnel to El Salvador and reprinted in the Congressional Record. (Ex. 17 to Defendants' Motion to Dismiss.) According to General Graves, the Military Mobile Training Teams which have been dispatched to El Salvador since November, 1979 have the sole function of training Salvadoran military personnel so as to create a self-training capability in particular skills, and have never served as advisors, accompanied military units on combat operations, or given those units advice on or worked with them to plan or coordinate the actual performance of offensive or defensive combat operations. Although not exactly claiming that American military personnel have never been exposed to hostile fire, Graves asserts that at no time has insurgent

activity directly or immediately threatened the security of training personnel sufficiently to warrant withdrawal of those individuals. The State Department statement echoes General Graves' assessment of the situation. It states that U.S. forces in El Salvador have not and will not act as combat advisors, accompany Salvadoran forces in combat, on operational patrols, or in any situation where combat is likely, and that they have not been subject to attack.

In contrast, plaintiffs contend that American military personnel in El Salvador are taking part in coordinating the war effort and are assisting in planning specific operations against the FMLN. Also, many of the 56 military

personnel[2] are alleged to work in and around areas where there is heavy combat. First Amended Complaint at 5-7. Two armed attacks on locations where U.S. military personnel were stationed are described in the Complaint, and another is described in Plaintiffs' Opposition to Defendants' Motion to Dismiss and Exhibit 4X thereto.

More recently, plaintiffs have supplemented their pleadings to bolster their contention that American forces in El Salvador have been introduced into

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[2]The numbers and locations of U.S. military personnel in El Salvador have changed since the complaint was filed, as is evident from Ex. 4A to Plaintiffs' Opposition to Defendants' Motion to Dismiss, which describes the withdrawal or reduction in numbers of some teams described in the Complaint and the placement of others, and indicates a total of 40 individuals as of late summer 1981. Ex. 4A at 7. The Court has not been informed as to the current number and locations of U.S. Armed Forces in El Salvador.

hostilities or imminent hostilities. They rely upon two news articles. The first is to the effect that U.S. Armed Forces are "fighting side by side" with government troops battling against the FMLN. The second concerns a General Accounting Office (GAO) report which reportedly disclosed that U.S. Military personnel in El Salvador are drawing "hostile fire pay," and that a tentative Pentagon ruling that all of El Salvador qualified as a "hostile fire area" was reversed for "policy reasons," possibly to avoid the necessity of reporting to Congress under the WPR. (The actual GAO report has not been submitted.)

In sum, if plaintiffs' allegations are correct, the executive branch does not merely have a different view of the application of the WPR to the facts, but also is distorting the reality of our involvement in El Salvador. This

discrepancy as to factual matters is also evident in the contrast between plaintiffs' allegations regarding the human rights situation in El Salvador, and the President's certifications under the Foreign Assistance Act, discussed infra. Plaintiffs' allegations, which are to be accepted as true for the purpose of a motion to dismiss, are, at a minimum, disturbing. This nonetheless does not mean that judicial resolution is appropriate to vindicate, allay or obviate plaintiffs' concerns.

The Court concludes that the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable. The questions as to the nature and extent of the United States' presence in El Salvador and whether a

report under the WPR is mandated because our forces have been subject to hostile fire or are taking part in the war effort are appropriate for congressional, not judicial, investigation and determination. Further, in order to determine the application of the 60-day provision, the Court would be required to decide at exactly what point in time U.S. forces had been introduced into hostilities or imminent hostilities, and whether that situation continues to exist. This inquiry would be even more inappropriate for the judiciary.

In Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), Justice Brennan identified several categories of "political questions". The question here belongs to the category characterized by a lack of judicially discoverable and manageable standards for resolution. The Court disagrees with defendants that this

is the type of political question which involved potential judicial interference with executive discretion in the foreign affairs field. Plaintiffs do not seek relief that would dictate foreign policy but rather to enforce existing law concerning the procedures for decision-making. Moreover, the issue here is not a political question simply because it involves the apportionment of power between the executive and legislative branches. The duty of courts to decide such questions has been repeatedly reaffirmed by the Supreme Court. See e.g. Nixon v. Fitzgerald, ___ U.S. ___, 102 S.Ct. 2690, 2703-04, 72 L.Ed.2d 349 (1982); United States v. Nixon, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974); Buckley v. Valeo, 424 U.S. 1, 123, 96 S.Ct. 612, 684, 46 L.Ed.2d 659, (1976).

However, the question presented does require judicial inquiry into sensitive military matters. Even if the plaintiffs could introduce admissible evidence concerning the state of hostilities in various geographical areas in El Salvador where U.S. forces are stationed and the exact nature of U.S. participation in the conflict (and this information may well be unavailable except through inadmissible newspaper articles), the Court no doubt would be presented conflicting evidence on those issues by defendants. The Court lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador. See Atlee v. Laird, 347 F.Supp. 689 (E.D.Pa. 1972)(three judge court), aff'd without opinion, 411 U.S. 921, 93 S.Ct. 1545, 36 L.Ed.2d 304 (1973); Holtzman v.

Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936, 94 S.Ct. 1935, 40 L.Ed.2d 286 (1974).

Admittedly, a case could arise with facts less elusive than these. For example, this Circuit in Mitchell v. Laird, 488 F.2d 611 (D.C. Cir. 1973), held that the court could determine the truth of allegations to the effect that the United States had been involved in hostilities in Indo-China for at least seven years, which hostilities had resulted in one million deaths, including those of 50,000 Americans, and for which the United States had spent at least one hundred billion dollars. If such allegations were true, the court stated, it would conclude that the United States was at war in Indo-China. Were a court asked to declare that the War Powers Resolution was applicable to a situation like that in Vietnam, it would be absurd for it to

decline to find that U.S. forces had been introduced into hostilities after 50,000 American lives had been lost.[3] However, here the Court faces a dispute as to whether a small number of American military personnel who apparently have suffered no casualties have been introduced into hostilities or imminent hostilities. The subtleties of factfinding in this situation should be left to the political branches. If Congress doubts or disagrees with the Executive's determination that U.S. forces in El Salvador have not been

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[3]Since the Court does not fully decide the questions of standing, equitable discretion and private right of action here, it does not conclude that a court should entertain an action to enforce the WPR where the existence of involvement in hostilities is easily ascertainable. The Court merely states that although there might be other barriers to such an action, it would not be a political question.

introduced into hostilities or imminent hostilities, it has the resources to investigate the matter and assert its wishes. The Court need not decide here what type of congressional statement or action would constitute an official congressional stance that our involvement in El Salvador is subject to the WPR, because Congress has taken absolutely no action that could be interpreted to have that effect. Certainly, were Congress to pass a resolution to the effect that a report was required under the WPR, or to the effect that the forces should be withdrawn, and the President disregarded it, a constitutional impasse appropriate for judicial resolution would be presented. Goldwater v. Carter, 444 U.S. 996, 100 S.Ct. 533, 62 L.Ed.2d 428 (1976)(Powell, J., concurring).

Even if the factfinding here did not require resolution of a political

question, this Court would not order withdrawal of U.S. forces at this juncture. At most, it could order that a report be filed. This conclusion is based upon the structure and legislative history of the WPR.

The War Powers Resolution, which was considered and enacted as the Vietnam war was coming to an end, was intended to prevent another situation in which a President could gradually build up American involvement in a foreign war without congressional knowledge or approval, eventually presenting Congress with a full-blown undeclared war which on a practical level it was powerless to stop. While Congress always had the power to deny appropriations supporting a military engagement, it found it politically impossible to do so after large numbers of American lives had been placed at risk and American honor committed.

The purpose of the WPR was to give Congress both the knowledge and the mechanism needed to reclaim its constitutional power to declare war. In the words of Senator Javits, one of its authors and prime sponsors, the Resolution

> is an effort to learn from the lessons of the last tragic decade of war in Vietnam which has cost our nation so heavily in blood, treasure, and morale. The War Powers Act would assure that any future decision to commit the United States to any warmaking must be shared in by the Congress to be lawful.

119 Cong. Rec. 1394 (1973).

So that Congress would be informed at the outset of any involvement that could potentially lead to war, the Resolution provides for prior consultation (not at issue here), and early reporting whenever any American troops are introduced into a situation of hostilities, or even imminent hostilities, on the President's initiative and

without a declaration of war. The President is not to wait until our forces are actually engaged in combat before informing Congress. Further, the automatic cutoff after 60 days was intended to place the burden on the President to seek positive approval from the Congress, rather than to require the Congress positively to disapprove the action, which had proven so politically difficult during the Vietnam war. To give force to congressional power to declare war, Presidential warmaking would not be justified by congressional silence, but only by a congressional initiative to "declare war."[4] Again in Senator Javits' words,

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[4]Because of the complex international implications of a formal declaration of war, and the possible desirability of engaging in military action without a formal declaration, the

(Footnote Continued)

> The approach taken in the War Powers Bill reverses the situation by placing the burden on the Executive to come to Congress for specific authority. The sponsors of the Bill believe that this provision [the 60-day automatic cutoff] will provide an important national safeguard against creeping involvement in future Vietnam style wars."

119 Cong. Rec. 1400 (1973).

The 60-day automatic cutoff provision, referred to in the House Committee report as intended to "deny the President the authority to commit U.S. Armed Forces for more than 120 [changed to 60 in conference] days without further specific congressional approval," H.R.Rep. No. 287, 93rd Cong., 1st Sess., reprinted in 1973 U.S. Code Cong. & Ad.News 2346, 2353, was probably the most controversial in the bill which led to

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(Footnote Continued)
WPR also provides for specific authorization of an action. This ensures positive congressional action while avoiding a formal declaration.

the Resolution. The 60-day cutoff was the subject of dissenting views in the committee reports and floor amendments designed to require positive congressional action to require withdrawal, and measured strongly in President Nixon's veto of the bill. However, in the face of powerful opposition, it was included in the final enactment.

Plaintiffs contend that the Resolution is fully self-executing, designed as it is to prevent involvement in military actions without positive action by Congress. When U.S. forces are introduced into hostilities or a situation of imminent hostilities, the reporting requirement automatically comes into play, and the President violates the law if he does not make the mandated report. Further, whether or not he makes the report, the 60-day period begins to run from the time the report should have been

submitted. (The Resolution reads, "[w]ithin sixty calendar days after a report is submitted or is required to be submitted...whichever is earlier..." WPR §5(b), 50 U.S.C. §1544(b), emphasis added.) Thus, according to the plaintiffs, after 62 days (60 days plus the 48 hours before a report is required), whether or not a report has been made, the President is required to withdraw the Armed Forces if Congress has not declared war or enacted a specific authorization for the action. Plaintiffs contend that a court may find the facts as to whether the situation into which American forces have been introduced constitutes hostilities or imminent hostilities, and if it so finds, it may order the President to make the report or to withdraw the forces.

Defendants do not dispute the interpretation of the basic purpose of

the WPR presented here and emphasized by plaintiffs. However, they deny that it is self-executing in a situation where a report has not been submitted. They argue that the decision as to whether a situation warrants a report under the WPR is left to the President's discretion in the first instance. In their view, his failure to submit a report does not justify a court action, and the 60-day period does not begin to run from the time he assertedly should have filed the report. Rather, in instances of disagreement between the President and Congress as to whether a report is required, a "second trigger" is needed to bring the WPR into play. Congress must either take action to express its view that the WPR is applicable to the situation and that a report is required, or, if it desires immediate withdrawal of forces, pass a concurrent resolution

directing removal of the forces pursuant to §5(c) of the WPR, 50 U.S.C. §1544(c).[5] Amici interpret the reference in the 60-day automatic termination provision to a report which "is required to be submitted" to apply to a situation where Congress has voted to require a report, and not, as plaintiffs claim, to a situation where the objective circumstances allegedly require a report but no congressional action has been taken.

The Court finds that the legislative scheme did not contemplate court-ordered withdrawal when no report has been filed, but rather, it leaves open the possibility for a court to order that a

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[5] Section 5(c) applies by its terms only to situations where United States Armed Forces are "engaged in hostilities," and therefore presumably not to situations where imminent involvement in hostilities is clearly indicated by the circumstances.

report be filed or, alternatively, withdrawal 60 days after a report was filed or required to be filed by a court or Congress. The legislative scheme was carefully designed to force congressional consideration of American military involvement abroad once a report is filed. The priority procedures of Section 6 of the Act, 50 U.S.C. §1545, assure that a bill or resolution introduced to approve military involvement which has been the subject of a WPR report will be promptly considered by both houses of Congress. Accordingly, while the involvement will automatically terminate after 60 days if either house fails to act or if the two houses are unable to reach an agreement, this can only occur after open and formal consideration of the question by both full houses, provided that at least one member of either house introduces a bill or

resolution. In contrast, when no report has been submitted, there will not necessarily be any debate or floor consideration of the issue at all. If plaintiffs' position is correct, total congressional inaction (which perhaps could signify general agreement with the President's appraisal that no report is required) could result in mandatory withdrawal of U.S. forces if a court adjudged that they had been introduced into hostilities or imminent hostilities more than 60 days previously. In all of the extensive debate on the mandatory withdrawal provision, this possibility was never entertained. In fact, Congressman, Zablocki, Chairman of the Foreign Affairs Subcommittee on National Security Policy and Scientific Developments which reported out the bill, clearly stated that mandatory withdrawal would not come about without

congressional action. Congress would be actively involved in considering legislation either approving or disapproving the President's action virtually as soon as it was introduced, and the ability of any one of the 535 members to trigger the priority procedures would assure that the question came to an eventual up or down vote. 119 Cong. Rec. 24653 (1973). Congress would be well aware that if it failed to specifically authorize the involvement, it would terminate after 60 days. However, in a situation where no report has been filed, and the priority procedures would not be invoked, the majority of Congress might not be of the opinion that a specific authorization is necessary for continued involvement and take no action, unaware that this course would result in mandatory withdrawal. In that instance court-ordered withdrawal could thwart the will of the majority of

Congress. Therefore, when a report has not been filed, it is consistent with the purposes and structure of the WPR to require further congressional action before the automatic termination provision operates.

The requirement to file a report, however, is a different matter. The mere filing of a report cannot thwart congressional will, but can only supply information to aid congressional decisionmaking. Although the Court need not reach the question because the nature of the factfinding in these circumstances precludes judicial inquiry, it does not foreclose the possibility of a court determination that a report is required under the WPR. If, hypothetically, a court did order a report under the WPR, Congress would than have 60 days to give the matter its full consideration in accordance with the priority procedures

of the Resolution before withdrawal would be automatically required. Likewise, if Congress itself requires a report, the 60 days for consideration of whether or not to authorize the action would begin at that point. Of course, Congress can always order immediate withdrawal if it so chooses.

The arguments discussed above convince the Court that the cause must be dismissed. Therefore, it is unnecessary to reach the other asserted bases for dismissal, which include standing, equitable discretion and lack of a private right of action. As already stated, the Court does not decide that all disputes under the War Powers Resolution would be inappropriate for judicial resolution.

The Foreign Assistance Act

Section 502B of the Foreign Assistance Act, 22 U.S.C. §2304 states in part:

> Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. 22 U.S.C. §2304(a)(2).

Plaintiffs (supporting their argument with voluminous documentation, largely reports from Amnesty International and other religious and human rights organizations) contend that the government of El Salvador has engaged in a consistent pattern of gross violations of internationally recognized human rights. Such violations are alleged to include political assassinations of massive number of unarmed, innocent civilians, arbitrary arrests, cruel and inhuman punishment and imprisonment, disappearances, and

torture. Therefore, plaintiffs contend, the security assistance[6] being provided to El Salvador is illegal and should be enjoined by this Court. Defendants seek dismissal on the same grounds they applied to the WPR: political question, standing, equitable discretion, and lack, of private right of action. Because the Court decides that the action under the Foreign Assistance Act must be dismissed in its equitable discretion, it does not reach the other issues.

The doctrine of equitable discretion in congressional plaintiff cases was set forth for this Circuit in Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir. 1981). When a member of

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[6]The Act defines security assistance to include military assistance, economic support under Part V of the Act, military education and training, and sale of defense articles or services.

Congress is a plaintiff in a lawsuit, concern about separation of powers counsels judicial restraint even where a private plaintiff may be entitled to relief. Where the plaintiff's dispute appears to be primarily with his fellow legislators, "[j]udges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking." Id., 656 F.2d at 881. Here, plaintiffs' concern that aid is being given to a country which is engaging in a consistent pattern of gross violations of human rights has been directly addressed by Congress. In Section 728 of the International Security and Development Cooperation Act of 1981, assistance to El Salvador was conditioned upon certification by the President, 30 days after

enactment and every 180 days thereafter, that the government of El Salvador is making a concerted and significant effort to comply with internationally recognized human rights, is achieving substantial control over all elements of its own armed forces, is making continued progress in implementing essential economic and political reforms, including the land reform program, and is committed to the holding of free elections. Since its enactment, the President has made two certifications under the Act. Congress has taken no action to end aid to El Salvador under the Foreign Assistance Act, 22 U.S.C. §2304(c)(4)(A), or by other means. Plaintiffs have asked the court to examine independently the President's certifications of the progress of El Salvador's government in the human rights field, which have been characterized by certain individual

members of Congress akin to calling night day or a duck an eagle. Plaintiffs' Reply to Defendants' Supplemental Memorandum in Support of their Motion to Dismiss at 5. Whatever infirmities the President's certifications may or may not suffer, it is clear that under these circumstances plaintiffs' dispute is primarily with their fellow legislators who have authorized aid to El Salvador while specifically addressing the human rights issues, and who have accepted the President's certifications.

The claim under the Foreign Assistance Act differs significantly from that under the War Powers Resolution, which raises a constitutional question of Presidential usurpation of congressional warmaking power. In addition, the Resolution contains a specific provision that legislation cannot authorize Presidential action subject to the WPR unless

it specifically states that it is authorization for the purposes of the WPR. Here there is no such restraint, and, indeed, the Congress has expressed its approval of the aid in question.

While a court upon scrutiny of detailed discovery might not agree with the President's assessment of the human rights situation in El Salvador, and could possibly conclude that the provision of security assistance under these circumstances violates section 502B of the Foreign Assistance Act, the equitable discretion doctrine prevents consideration of these issues on behalf of congressional plaintiffs. Their dispute is primarily with their fellow legislators. Action by this Court would not serve to mediate between branches of government, but merely aid plaintiffs in circumventing the democratic processes available to them.

Therefore, it is this 4th day of October, 1982, hereby

ORDERED, that defendants' motion to dismiss be, and it hereby is, granted, and this cause stands dismissed.

JOYCE HENS GREEN
UNITED STATES
DISTRICT JUDGE

APPENDIX C

WAR POWERS RESOLUTION

§1511. Purpose and policy

(a) Congressional declaration

It is the purpose of this chapter to fulfill the intent of the framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and to the continued use of such forces in hostilities or in such situations.

(b) Congressional legislative power under necessary and proper clause

Under article I, section 8, of the Constitution, it is specifically provided that the Congress shall have the power to make all laws necessary and proper for carrying into execution, not only its own powers but also all other powers vested by the Constitution in the Government of the United States, or in any department or officer hereof.

(c) Presidential executive power as Commander-in-Chief: limitation

The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities, or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.

§1542. Consultation: initial and regular consultations

The President in every possible instance shall consult with Congress before introducing United States Armed Forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances, and after every such introduction shall consult regularly with the Congress until United States Armed Forces are no longer engaged in hostilities or have been removed from such situations.

§1543. Reporting requirement

(a) Written report: time of submission: circumstances necessitating submission; information reported

In the absence of a declaration of war, in any case in which United States Armed Forces are introduced--

(1) into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances;

(2) into the territory, airspace or waters of a foreign nation, while equipped for combat, except for deployments which relate solely to supply, replacement, repair, or training of such forces: or

(3) in numbers which substantially enlarge United States Armed Forces equipped for combat already located in a foreign nation:

the President shall submit within 48 hours to the Speaker of the House of Representatives and to the President pro tempore of the Senate a report, in writing, setting forth--

(A) the circumstances necessitating the introduction of United States Armed Forces:

(B) the constitutional and legislative authority under which such introduction took place: and

(C) the estimated scope and duration of the hostilities or involvement.

(b) Other information reported

The President shall provide such other information as the Congress may request in the fulfillment of its constitutional responsibilities with respect to committing the Nation to war and to the use of United States Armed Forces abroad.

(c) Periodic reports: semiannual requirement

Whenever United States Armed Forces are introduced into hostilities or into any situation described in subsection (a) of this section, the President shall, so long as such armed forces continue to be engaged in such hostilities or situation, report to the Congress periodically on the status of such hostilities or situation as well as on the scope and duration of such hostilities or situation, but in no event shall he report to the Congress less often than once every six months.

§1544. Congressional action

(a) Transmittal of report and referral to Congressional Committees; joint request for convening Congress

Each report submitted pursuant to section 1543(a)(1) of this title shall be transmitted to the Speaker of the House of Representatives and to the President pro tempore of the Senate on the same calendar day. Each report so transmitted shall be referred to the Committee on International Relations of the House of Representatives and to the Committee on

Foreign Relations of the Senate for appropriate action. If, when the report is transmitted, the Congress has adjourned sine die or has adjourned for any period in excess of three calendar days, the Speaker of the House of Representatives and the President pro tempore of the Senate, if they deem it advisable (or if petitioned by at least 30 percent of the membership of their respective Houses) shall jointly request the President to convene Congress in order that it may consider the report and take appropriate action pursuant to this section.

(b) Termination of use of United States Armed Forces; exceptions; extension period

Within sixty calendar days after a report is submitted or is required to be submitted pursuant to section 1543(a)(1) of this title, whichever is earlier, the President shall terminate any use of United States Armed Forces with respect to which such report was submitted (or required to be submitted), unless the Congress (1) has declared war or has enacted a specific authorization for such use of United States Armed Forces, (2) has extended by law such sixty-day period, or (3) is physically unable to meet as a result of an armed attack upon the United States. Such sixty-day period shall be extended for not more than an additional thirty days if the President determines and certifies to the Congress in writing that unavoidable military necessity respecting the safety of United States Armed Forces requires the continued use of such armed forces in the course of bringing about a prompt removal of such forces.

(c) Concurrent resolution for removal by President of United States Armed Forces

Notwithstanding subsection (b) of this section, at any time that United States Armed Forces are engaged in hostilities outside the territory of the United States, its possessions and territories without a declaration of war or specific statutory authorization, such forces shall be removed by the President if the Congress so directs by concurrent resolution.

§1545. Congressional priority procedures for joint resolution or bill

(a) Time requirement; referral to Congressional committee; single report

Any joint resolution or bill introduced pursuant to section 1544(b) of this title at least thirty calendar days before the expiration of the sixty-day period specified in such section shall be referred to the Committee on International Relations of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and such committee shall report one such joint resolution or bill, together with its recommendations, not later than twenty-four calendar days before the expiration of the sixty-day period specified in such section, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote

Any joint resolution or bill so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents), and shall

be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee

Such a joint resolution or bill passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out not later than fourteen calendar days before the expiration of the sixty-day period specified in section 1544(b) of this title. The joint resolution or bill so reported shall become the pending business of the House in question ad shall be voted on within three calendar days after it has been reported, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses

In the case of any disagreement between the two Houses of Congress with respect to a joint resolution or bill passed by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such resolution or bill not later than four calendar days before the expiration of the sixty-day period specified in section 1544(b) of this title. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than the expiration of such sixty-day period.

§1546. Congressional priority procedures for concurrent resolution

(a) Referral to Congressional committee; single report

Any concurrent resolution introduced pursuant to section 1544(c) of this title shall be referred to the Committee on International Relations of the House of Representatives or the Committee on Foreign Relations of the Senate, as the case may be, and one such concurrent resolution shall be reported out by such committee together with its recommendations within fifteen calendar days, unless such House shall otherwise determine by the yeas and nays.

(b) Pending business; vote

Any concurrent resolution so reported shall become the pending business of the House in question (in the case of the Senate the time for debate shall be equally divided between the proponents and the opponents) and shall be voted on within three calendar days thereafter, unless such House shall otherwise determine by yeas and nays.

(c) Referral to other House committee

Such a concurrent resolution passed by one House shall be referred to the committee of the other House named in subsection (a) of this section and shall be reported out by such committee together with it recommendations within fifteen calendar days and shall thereupon become the pending business of such House and shall be voted upon within three calendar days, unless such House shall otherwise determine by yeas and nays.

(d) Disagreement between Houses

In the case of any disagreement between the two Houses of Congress with respect to a concurrent resolution passed

by both Houses, conferees shall be promptly appointed and the committee of conference shall make and file a report with respect to such concurrent resolution within six calendar days after the legislation is referred to the committee of conference. Notwithstanding any rule in either House concerning the printing of conference reports in the Record or concerning any delay in the consideration of such reports, such report shall be acted on by both Houses not later than six calendar days after the conference report is filed. In the event the conferees are unable to agree within 48 hours, they shall report back to their respective Houses in disagreement.

§1547. Interpretation of joint resolution

(a) Inferences from any law or treaty

Authority to introduce United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances shall not be inferred--

(1) from any provision of law (whether or not in effect before November 7, 1973), including any provision contained in any appropriation Act, unless such provision specifically authorizes the introduction of United States Armed Forces into hostilities or into such situations and states that it is intended to constitute specific statutory authorization within the meaning of this chapter; or

(2) from any treaty heretofore or hereafter ratified unless such treaty is implemented by legislation specifically authorizing the introduction of United States Armed Forces into hostilities or into such situations and stating that it

is intended to constitute specific statutory authorization within the meaning of this chapter.

(b) Joint headquarters operations of high-level military commands

Nothing in this chapter shall be construed to require any further specific statutory authorization to permit members of United States Armed Forces to participate jointly with members of the armed forces of one or more foreign countries in the headquarters operations of high-level military commands which were established prior to November 7, 1973, and pursuant to the United Nations Charter or any treaty ratified by the United States prior to such date.

(c) Introduction of United States Armed Forces

For purposes of this chapter, the term "introduction of United States Armed Forces" includes the assignment of members of such armed forces to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government when such military forces are engaged, or there exists an imminent threat that such forces will become engaged, in hostilities.

(d) Constitutional authorities or existing treaties unaffected; construction against grant of Presidential authority respecting use of United States Armed Forces

Nothing is this chapter--

(1) is intended to alter the constitutional authority of the Congress or of the President, or the provisions of existing treaties; or

(2) shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this chapter.

§1548. Separability of provisions

If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the remainder of the chapter and the application of such provision to any other person or circumstance shall not be affected thereby.

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22 U.S.C. §2304. HUMAN RIGHTS AND SECURITY ASSISTANCE ACT

Observance of human rights as principal goal of foreign policy: implementation requirements

(a)(1) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principal goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.

(2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. Security assistance may not be provided to the police, domestic intelligence, or similar law enforcement forces of a country, and licenses may not be issued under the Export Administration Act of 1979 for the export of crime control and detection instruments and equipment to a country, the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance and issuance of such licenses. Assistance may not be provided under part V of this subchapter to a country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights unless the President certifies in writing to the Speaker of the House of Representatives and the chairman of the Committee on Foreign Relations of the Senate that extraordinary circumstances exist warranting provision of such assistance.

(3) In furtherance of paragraphs (1) and (2) , the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with

governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.

Report by Secretary of State on practices of proposed recipient countries; considerations

(b) The Secretary of State shall transmit to the Congress, as part of the presentation materials for security assistance programs proposed for each fiscal year, a full and complete report, prepared with the assistance of the Assistant Secretary of State for Human Rights and Humanitarian Affairs, with respect to practices regarding the observance of and respect for internationally recognized human rights in each country proposed as a recipient of security assistance. In determining whether a government falls within the provisions of subsection (a)(3) of this section and in the preparation of any report or statement required under this section, consideration shall be given to--

(1) the relevant findings of appropriate international organizations, including nongovernmental organizations, such as the International Committee of the Red Cross; and

(2) the extent of cooperation by such government in permitting an unimpeded investigation by any such organization of alleged violations of internationally recognized human rights.

Congressional request for information; information required; 30 day period; failing to supply information; termination or restriction of assistance

(c)(1) Upon the request of the Senate or the House of Representatives by resolution of either such House, or upon the request of the Committee on Foreign Relations of the Senate or the Committee on Foreign Affairs of the House of Representatives, the Secretary of State shall, within thirty days after receipt of such request, transmit to both such committees a statement, prepared with the assistance of the Assistant Secretary for Human Rights and Humanitarian Affairs, with respect to the country designated in such request, setting forth--

(A) all the available information about observance of and respect for human rights and fundamental freedom in that country, and a detailed description of practices by the recipient government with respect thereto;

(B) the steps the United States has taken to--

(i) promote respect for and observance of human rights in that country and discourage any practices which are inimical to internationally recognized human rights, and

(ii) publicly or privately call attention to, and disassociate the United States and any security assistance provided for such country from, such practices;

(C) whether, in the opinion of the Secretary of State, notwithstanding any such practices--

(i) extraordinary circumstances exist which necessitate a continuation of security assistance for such

country, and, if so, a description of such circumstances and the extent to which such assistance should be continued (subject to such conditions as Congress may impose under this section), and

(ii) on all the facts it is in the national interest of the United States to provide such assistance; and

(D) such other information as such committee or such House may request.

(2)(A) A resolution of request under paragraph (1) of this subsection shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

(B) The term "certification", as used in section 601 of such Act, means, for the purposes of this subsection, a resolution of request of the Senate under paragraph (1) of this subsection.

(3) In the event a statement with respect to a country is requested pursuant to paragraph (1) of this subsection but is not transmitted in accordance therewith within thirty days after receipt of such request, no security assistance shall be delivered to such country except as may thereafter be specifically authorized by law from such country unless and until such statement is transmitted.

(4)(A) In the event a statement with respect to a country is transmitted under paragraph (1) of this subsection, the Congress may at any time thereafter adopt a joint resolution terminating, restricting or continuing security assistance for such country. In the event such a joint resolution is adopted, such assistance shall be so terminated, so restricted, or so continued, as the case may be.

(B) Any such resolution shall be considered in the Senate in accordance with the provisions of section 601(b) of the International Security Assistance and Arms Export Control Act of 1976.

(C) The term "certification", as used in section 601 of such Act means, for the purposes of this paragraph, a statement transmitted under paragraph (1) of this subsection.

Definitions

(d) For the purposes of this section--

(1) the term "gross violations of internationally recognized human rights" includes torture or cruel, inhuman, or degrading treatment or punishment, prolonged detention without charges and trial, causing the disappearance of persons by the abduction and clandestine detention of those persons, and other flagrant denial of the right to life, liberty, or the security of person; and

(2) the term "security assistance" means--

(A) assistance under part II (military assistance) or part IV (economic support fund) or part V (military education and training) or part VI (peacekeeping operations) of this subchapter;

(B) sales of defense articles or services, extensions of credits (including participations in credits, and guaranties of loans under the Arms Export Control Act; or

(C) any license in effect with respect to the export of defense articles or defense services to or for the armed forces, police, intelligence, or other internal security forces of a

foreign country under section 38 of the Arms Export Control Act.

Removal of prohibition on assistance

(e) Notwithstanding any other provision of law, funds authorized to be appropriated under subchapter I of this chapter may be made available for the furnishing of assistance to any country with respect to which the President finds that such a significant improvement in its human rights record has occurred as to warrant lifting the prohibition on furnishing such assistance in the national interest of the United States.

Allocations concerned with performance record of recipient countries without contravention of other provisions

(f) In allocating the funds authorized to be appropriated by this chapter and the Arms Export Control Act, the President shall take into account significant improvements in the human rights records of recipient countries, except that such allocations may not contravene any other provision of law.

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No. 83-1398

In the Supreme Court of the United States

OCTOBER TERM, 1983

GEORGE CROCKETT, JR., ETC., ET AL., PETITIONERS

v.

RONALD WILSON REAGAN, PRESIDENT OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners, who are Members of Congress, challenge the legality of United States military assistance to El Salvador.

1. The War Powers Resolution (WPR), 50 U.S.C. 1541 *et seq.*, provides that if, "[i]n the absence of a declaration of war, * * * United States Armed Forces are introduced * * * into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances" (50 U.S.C. 1543(a)(1)), the President shall submit a written report to the Speaker of the House and the President pro tempore of the Senate.[1] The Foreign Assistance Act of 1961

[1]This report is to provide the following information (50 U.S.C. 1543(a)):

> (3)(A) the circumstances necessitating the introduction of United States Armed Forces;

(FAA), 22 U.S.C. 2151 *et seq.*, generally prohibits the provision of security assistance "to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights" unless the President certifies that "extraordinary circumstances exist warranting provision of such assistance" (22 U.S.C. 2304(a)(2)). Since 1979, the United States, at the request of the government of El Salvador, has deployed military training teams in that country and has provided it with financial assistance for economic, military, and security purposes. The President has not submitted the report described in the WPR or the certification mentioned in the FAA in connection with these activities.

2. Petitioners brought this suit against the President, the Secretary of State, and the Secretary of Defense in the United States District Court for the District of Columbia. Petitioners contended that American forces in El Salvador were in a situation "where imminent involvement in hostilities is clearly indicated" and that El Salvador had engaged in consistent violations of human rights. They accordingly claimed that the President had violated the WPR and the FAA.[2] Petitioners sought, among other things, "a writ of

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(B) the constitutional and legislative authority under which such introduction took place; and

(C) the estimated scope and duration of the hostilities or involvement.

[2]Petitioners have also suggested that by sending Armed Forces personnel to El Salvador, the President violated the War Powers Clause of the Constitution, Article I, Section 8, Clause 11, which provides that Congress has the power to declare war. But petitioners have not distinguished this claim from their claim under the WPR (see, *e.g.*, Pet.28) nor have they asserted that the War Powers Clause gives them any rights other than those they have under the WPR. See 50 U.S.C. 1547(d)(1): "Nothing in [the WPR] * * * is intended to alter the constitutional authority of the Congress or of the President * * *."

In any event, the War Powers Clause grants power to Congress as an institution, not to individual Members of Congress. Petitioners —

mandamus and/or an injunction directing that [the government] immediately withdraw all United States Armed Forces, weapons, and military equipment and aid from El Salvador and prohibiting any further aid of any nature" (Pet. App. A11).

The district court dismissed the complaint (Pet. App. A6-A46; 558 F. Supp. 893). The court noted that the government took the position "that the factual circumstances in El Salvador do not trigger the WPR" (Pet. App. A14). Thus, the court stated, "the question presented * * * require[s] judicial inquiry into sensitive military matters" (*id.* at A23). The district court remarked that it "lacks the resources and expertise (which are accessible to the Congress) to resolve disputed questions of fact concerning the military situation in El Salvador" (*ibid.*). The district court accordingly concluded that the claim under the WPR should be dismissed because it was not appropriate for judicial resolution (*id.* at A20-A21):

> The Court concludes that the factfinding that would be necessary to determine whether U.S. forces have been introduced into hostilities or imminent hostilities in El Salvador renders this case in its current posture non-justiciable. The questions as to the nature and extent of the United States' presence in El Salvador and whether a report under the WPR is mandated because our forces have been subject to hostile fire or

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individual Members who make no claim that Congress has authorized this suit — accordingly cannot sue to enforce the Clause. Congress as an institution has asserted its prerogatives under the Clause by enacting the WPR; that was the purpose of the Resolution. Since, as we demonstrate in text, the Resolution did not authorize or contemplate litigation such as this, petitioners cannot portray this case as an effort to protect Congress's institutional authority under the Clause.

> are taking part in the war effort are appropriate for congressional, not judicial, investigation and determination.

The district court explicitly noted that it did not "reach the other asserted bases for dismissal, which include standing, equitable discretion and lack of a private right of action" (*id.* at A39).

The district court then held that petitioners' claims under the FAA should be dismissed in the exercise of the court's "equitable discretion" (Pet. App. A41). The district court explained its ruling as follows (*id.* at A42-A44):

> [Petitioners'] concern that aid is being given to a country which is engaging in a consistent pattern of gross violations of human rights has been directly addressed by Congress. In Section 728 of the International Security and Development Cooperation Act of 1981 [Pub. L. No. 97-113, 95 Stat. 1519], assistance to El Salvador was conditioned upon certification by the President, 30 days after enactment and every 180 days thereafter, that the government of El Salvador is making a concerted and significant effort to comply with internationally recognized human rights * * *. Since its enactment, the President has made two certifications under the Act. Congress has taken no action to end aid to El Salvador under the Foreign Assistance Act * * * or by other means. Plaintiffs have asked the court to examine independently the President's certifications of the progress of El Salvador's government in the human rights field * * *. Whatever infirmities the President's certifications may or may not suffer, it is clear that under these circumstances [petitioners'] dispute is primarily with their fellow legislators who have authorized aid to El Salvador while specifically addressing the human rights issues, and who have accepted the President's certifications.

The court of appeals affirmed (Pet. App. A1-A5; 720 F.2d 1355) "for the reasons stated by the District Court" (Pet. App. A4). Judge Bork concurred on the ground that petitioners lacked standing. He reasoned that "an alleged diminution in congressional influence must amount to a disenfranchisement — a nullification or diminution of a congressman's vote — before a congressional plaintiff may claim the requisite injury-in-fact necessary to confer standing to sue" (*id.* at A5).

3. Petitioners' complaint was correctly dismissed, essentially for the reasons stated by the courts below. Moreover, it is clear that Congress did not intend either the WPR or the FAA to be enforced by litigation. Neither statute contains language suggesting that lawsuits by citizens or Members of Congress could be brought to enforce its provisions; petitioners have not identified anything in the legislative history of either statute suggesting that this is an appropriate means of enforcement; and there are many reasons to believe that Congress did not intend the courts to become involved in the sensitive issues between the executive and legislative branches that these statutes address.

a. Congress enacted the WPR to "insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities" (50 U.S.C. 1541(a)). Petitioners identify nothing in the language or legislative history of the WPR suggesting that Congress intended to enlist the judiciary in this effort. Indeed, passages from the legislative history cited by petitioners themselves suggest that Congress did not foresee judicial intervention but relied on the President to interpret the WPR and act according to its provisions. For example, Senator Javits, a leading proponent of the WPR, noted that crucial provisions of the Resolution " 'assume[] that the President will act according to law. No other assumption is possible unless we are to discard our

whole constitutional system.' " 119 Cong. Rec. 1401 (1973) (quoted at Pet. 37-38). And Senator Javits added (119 Cong. Rec. 1401 (1973)): "[W]hen the President's authority is so defined, as it will be if this War Powers bill becomes law, then the issue of authority is determined in an authoritative way, and, I have little doubt, will be carried out to the best of his ability in good faith by any American President."

In addition, as the district court ruled in this case, and as this Court has long recognized in comparable settings, the questions that a court would have to decide in order to adjudicate a claim under the WPR are wholly unfit for judicial resolution. As this Court stated in a well-known passage (*Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 111 (1948)):

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. * * * But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

See also *Goldwater* v. *Carter*, 444 U.S. 996, 1003-1004 (1979) (Rehnquist, J., concurring); *Coleman* v. *Miller*, 307 U.S. 433, 455 (1939); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936); *Holtzman* v. *Schlesinger*, 484 F.2d 1307, 1309-1312 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); *Atlee* v. *Laird*, 347 F. Supp. 689, 705 (E.D. Pa. 1972) (three-judge court), aff'd, 411 U.S. 911 (1973).

When Congress enacted the WPR, it was well aware that it was engaging in an act of considerable constitutional delicacy.[3] At the same time, Congress must have been aware of both the existence and the validity of the persistent judicial attitude that courts should not intercede to decide sensitive foreign policy questions. If Congress had intended courts to engage in the task of determining whether American servicemen are in a "situation[] where imminent involvement in hostilities is clearly indicated by the circumstances" (50 U.S.C. 1543(a)(1)), it is certain that Congress would have said so explicitly.

b. There is similarly no indication in the language or legislative history of the FAA that Congress intended the courts to become involved in its enforcement.[4] The question whether a foreign government has "engage[d] in a consistent pattern of gross violations of internationally recognized

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[3]For example, the first section of the Resolution carefully identifies its constitutional bases (see 50 U.S.C. 1541), and the penultimate section states that nothing in the Resolution "is intended to alter the constitutional authority of the Congress or of the President" (50 U.S.C. 1547(d)(1)).

[4]The human rights legislation pertaining specifically to El Salvador on which the district court relied (see Pet. App. A42-A44, quoted at page 4, *supra*) subsequently expired, as petitioners note (Pet. 15). But on November 14, 1983, Congress specifically authorized a continuation of military aid to El Salvador. Pub. L. No. 98-151, § 532, 97 Stat. 970. The district court's reasoning therefore remains valid.

human rights" (22 U.S.C. 2304(a)(2)) would require a court to make a factual inquiry of a kind to which courts are wholly unaccustomed and for which they are ill-equipped. Beyond that, for a court to order aid to that government terminated on the basis of such a finding would obviously have the greatest potential to embarrass the United States in the conduct of its foreign affairs. See *Baker* v. *Carr*, 369 U.S. 186, 217 (1962) (courts will refrain from deciding questions where doing so will create "the potentiality of embarrassment from multifarious pronouncements by various departments on one question"). If Congress intended to give courts this extraordinary role, it would surely have said so explicitly.

In addition, many other federal statutes resemble the provisions of the FAA that petitioners invoke in that they place restrictions on the authority of the executive branch to spend appropriated funds. To allow such restrictions routinely to be enforced by suits brought by Members of Congress would substantially reorder relations between Congress and the executive branch, and petitioners suggest no reason for this Court to bring about such a reordering. Indeed, petitioners appear to acknowledge that their only interest in this litigation is in ensuring that the executive branch follows the will of Congress (see, *e.g.*, Pet. 45-46), and as Judge Bork concluded, that interest is not sufficient to give petitioners standing. "This Court repeatedly has rejected claims of standing predicated on ' "the right, possessed by every citizen, to require that the Government be administered according to law. . . ." *Fairchild* v. *Hughes*, 258 U.S. 126, 129 [1922].' " *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 482-483 (1982), (quoting *Baker*, 369 U.S. at 208). See also *Schlesinger* v. *Reservists Committee to Stop the War*, 418 U.S. 208 (1974); *United States* v. *Richardson*, 418 U.S. 166 (1974); *Laird* v. *Tatum*, 408 U.S.

1 (1972); *Ex parte Levitt*, 302 U.S. 633 (1937). We know of no principle that Members of Congress have any greater right than ordinary citizens to bring a lawsuit based on only "the generalized interest * * * in constitutional governance" (*Schlesinger*, 418 U.S. at 217) or governance according to law. See, *e.g.*, *Harrington* v. *Bush*, 553 F.2d 190 (D.C. Cir. 1977); *Harrington* v. *Schlesinger*, 528 F.2d 455 (4th Cir. 1975); *McClure* v. *Carter*, 513 F. Supp. 265, 269-270 (D. Idaho) (three-judge court), aff'd, 454 U.S. 1025 (1981).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1984

DOJ-1984-05